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Supreme Court, U.S.
FILED
071233 MAR 25 2008
OFFICE OF THE CLERK

No.
October Term, 2008

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN BARRETT, M.D.
Petitioner

Versus

TEDD KOREN D.C. and
KOREN PUBLICATIONS, INC.
Respondent

On Petition For Writ of Certiorari from the Order of the Pennsylvania Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

STEPHEN BARRETT, M.D.	:NO. 502 MAL 2007
Petitioner	:
v.	:Petition For Allowance
TEDD KOREN and	:of Appeal from the
KOREN PUBLICATIONS	:Order of the Superior
INC.	:Court
Respondents	:

ORDER

PER CURIAM

AND NOW, this 2nd day of January, 2008, the Petition for Allowance of Appeal is hereby **DENIED.**

TRUE & CORRECT COPY
ATTEST: January 2, 2008 _____
Norina K. Blynn, Chief Clerk

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEPHEN BARRETT, M.D.	:NO. 502 MAIL 2007
Appellant	:
v.	:IN THE SUPERIOR COURT
TEDD KOREN and	:OF PENNSYLVANIA
KOREN PUBLICATIONS	:
INC.	:NO. 1035 EDA 2006
Appellees	:

Appeal from the Judgment entered April 7, 2006, in the Court of Common Pleas, Lehigh County, Civil No. 2002-C-1837

BEFORE: FORD ELLIOTT, P.J. BOWES, J., and McEWEN P.J.E.

MEMORANDUM: **FILED JUNE 11, 2007**

Appellant, Stephen Barrett, M.D. has taken this appeal from the judgment entered in favor of Appellees, Tedd Koren, D.C. [1] and Koren Publications, Inc. following the grant of appellees' motion for directed verdict and denial of appellant's post-trial motions in this

[1] Doctor of Chiropractic Medicine

health at Penn State University. He donated royalties from his first book to start a television show called *Talk With Your Doctor* to further educate people in the Lehigh Valley. One of his mail fraud investigations ultimately resulted in passage of a federal law strengthening the U.S. Postal Service's ability to crack down on mail-order health frauds. He has assisted the FBI, State Attorney Generals, the Federal Trade Commission and local law enforcement agencies on similar matters, as both a paid and unpaid consultant. Dr. Barrett has been a peer reviewer for seven medical journals, including the *Journal of the American medical Association.* His websites are the target of more than 100,000 hits each month. He has appeared on the Today Show and CNN to educate on healthcare. He earned numerous awards for his work.

After thirty-five years, at age sixty (60), Dr. Barrett opted to inactivate his Pennsylvania medical license in December, 1993. He was voluntarily retiring, without any negative marks upon his license or career. Dr. Barrett never had his license taken away from him. He simply chose to retire to an inactive status.

Appellee Koren is [a chiropractor and] the president of Appellee Koren Publications, Inc. He publishes an electronic subscription newsletter. He also publishes a free electronic

newsletter [of]which he is the sole author. Inside this free newsletter, Appellee has published several things pertaining to Dr. Barrett...
Brief of Appellant, pp. 4-5

Appellee's August, 2001 newsletter stated, in relevant part:

Contents
Palmer
Fear and loathing in Rio de Janiero
Quackbusters Buste[d]
The Therapeutic State
Tedd Koren Patient Newsletter
February Unseminar
Vitamin K shots
Weird hospital stuff
Fascinating Letters from you

I just got back from Palmer Lyceum...
****
Speaking of Sportelli, there's good news about [plaintiff] Stephen Barrett, M.D., the **de-licensed** quackbuster. Not good news for him, but it's pretty good for us.

Quackbusters Busted
Barrett and other 'Quack Busters' who have made a career of attacking chiropractic and other non-pharmaceutical health care arts have a

very thin skin when they are attacked. Their modus operandi is to attack, threaten and start legal actions against those who don't share their bigotry...

...One person Christ[e]ned Stephen Barrett a **'QuackPot'**. It seems that this label drives him especially crazy. (Let's use it all the time when referring to him.)...

But there's more...(is this starting to sound like a TV infomercial?).

Stephen Barrett, M.D., William Jarvis and the entire Quackbuster gang including many of Barrett's business enterprises, associates and organizations are being sued **for $10 million for racketeering, malicious prosecution, abuse of process and other charges** by New Century Press...

But there's more... 14 months ago I was told about the above lawsuit. **Barrett is now in trouble.** I can't tell you more but I will keep you abreast with the late breaking reports as the case develops.

Tedd Koren's August 2001 newsletter, Exhibit P-4 (emphasis supplied.

Appellant filed a complaint in defamation on March 10, 2003. More than two years later, on October 10, 2005, a jury trial commenced and, at the close of

appellees' case, both parties moved for a directed verdict. The trial court, on October 13, 2005, granted appellees' motion, and denied appellant's motion, and appellant thereafter filed post-trial motions seeking a new trial, which were denied. This appeal followed;

Preliminarily, we note our standard of review:

> When assessing the trial court's denial of a motion for new trial, we apply a deferential standard of review. The decision whether to grant or deny a new trial is one that lies within the discretion of the trial court. The appellate court will not overturn such a decision unless the trial court grossly abused its discretion or committed an error of law that controlled the outcome of the case.

McCandless v. Edwards 908 A.2d 900, 903 (Pa.Super. 2006) (citation omitted). In reviewing a trial court's decision to direct a verdict in favor of a defendant,

> we must view the evidence in the light most favorable to the plaintiff in order to determine

> whether plaintiff failed to prove his case as a matter of law. If a jury reasonably could have concluded, on the basis of the evidence and all reasonable inferences therefrom, that the defendant was liable, then the directed verdict must be reversed. Our review over questions of law is, as always, plenary.

Id. (citation omitted).

In this case, appellant, as the plaintiff below, had the burden to prove the elements of defamation[2], and further, as a public figure[3] had to further demonstrate that the statements were made with actual malice:

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[2] In Pennsylvania, the uniform Single Publication Act prescribes basic elements of the plaintiff's burden of proof in an action for defamation. **See** 42 Pa. C.S. §§8341-8345. Section 8343 provides:

(a) Burden of plaintiff.--In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised: (1) The defamatory character of the communication.
(2) Its publication by the defendant.
(3) Its application to the plaintiff.
(4) The understanding by the recipient of its defamatory meaning.
(5) The understanding by the recipient of it as intended to be applied to the plaintiff.
(6) special harm resulting to the plaintiff from its publication.
(7) Abuse of a conditionally privileged occasion.
42 Pa. C.S. §8434(a).

[3] There is no dispute that appellant is a public figure.

When the plaintiff is a public figure,..., he must prove that the statements he characterizes as defamatory were made with **actual malice, that is, the speaker either knew that they were false, or recklessly disregarded their falsity. [*Tucker v. Philadelphia Daily News,*** 577 Pa. 598, 624, 848 A.2d 113, 130 (2004)] The burden of proof imposed is substantial, as '[t]he actual malice standard goes so far as to forbid imposition of liability even in those instances where the defendant negligently publishes false, defamatory statements about a public figure or public official." ***Norton v. Glenn,*** 580 Pa. 212, 860 A.2d 48, d56 (2004), **cert. denied**, 544 U.S. 956, 125 S.Ct. 1700 161 L.Ed.2d 539 (2005). Indeed, '[f]ailure to check sources, or negligence alone, is simply insufficient to maintain a cause of action for defamation. Recklessness generally and in the context of actual malice is not easily shown." ***Tucker, supra*** at 135. Moreover, establishment of a defamation claim requires clear and convincing evidence, the highest level of proof for civil claims. ***Bartlett v. Bradford Publishing, Inc.*** 885 A.2d 562, 566 (Pa. Super. 2005) (citation omitted). A showing of actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." ***Curran v. Philadelphia Newspapers, Inc.*** s546 A.2d 639, 642 (Pa.Super. 1988), **appeal**

denied 522 Pa. 576, 559 A.2d 37 (1989) (*quoting* ***St. Amant v. Thompson,*** 390 U.S. 727, 731, [88 S.Ct. 1323, 20 L.Ed.2d 262] (1968).

Blackwell v. Eskin 2007 Pa. Super 20 at ¶6 (Pa. Super. 2007) (emphasis supplied).

The trial court granted appellees' motion for directed verdict based on the conclusion that appellant, a public figure, could not establish actual malice. Specifically, the trial court determined that appellant could not meet his burden since (1) the statements "quackpot" and "in trouble were merely opinion, (2) the statement 'racketeering lawsuit for 10 million" wasn't proven to be false, and (3) the statement that appellant was "de-licensed" was taken by Appellee from another author's website, without serious doubts as to its truth or falsity. The trial court concluded that on this record there was not sufficient evidence presented to permit

the conclusion by a jury, by clear and convincing evidence, that defendant, in fact, entertained serious doubts as to the truth of any of his publications. **See**: N.T. October 13, 2005. p. 19.

Appellant, in challenging the decision of the trial court that granted appellees' motion for a directed verdict, claims that he established actual malice as follows: (1) "appellee's ill will toward appellant provide[d} a motive for appellee's reckless disregard for the truth of his statements" (2) "Appellee made his statements with knowledge that they were false or with reckless disregard of their truth or falsity, (3) Koren's use of the word 'delicensed' was intended to mean that Barrett's license was involuntarily taken away,"[4] and (4) "the trial court improperly condoned appellee's attempt

[4] At trial, appellant testified that he had retired and place his license on "inactive' status. N.T. October 11, 2005. p. 71.

to sanitize the publication of the 'de-licensed' statement by claiming he simply took the statement from another author's writings.[5]

Specifically, appellant contends that Appellees "had a high degree of awareness that their publication contained falsehoods.[6] Appellant argues that "[a]lthough "delicensed" is not really a word, the clear implication of placing "de" in front of "licensed" when referring to a doctor is that the doctor's license was taken away.[7] In support of his position, appellant, at trial, introduced Tedd Koren's deposition testimony. In his deposition Appellee Koren testified that he had been a licensed chiropractor in West Virginia and Pennsylvania, and that had let his West Virginia license lapse by not paying the fees and not attending the

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[5] Brief of Appellant, pp. 12-17
[6] **Id.** p. 13
[7] **Id.** p. 14.

required post-graduate education. Appellant's counsel then asked Koren "Well, were you de-licensed by West Virginia? In response, Appellee answered "no-I just stopped paying the fees.[8] Appellant claims that this testimony demonstrates that Appellee intended to convey that appellant's "delicens[ing]" was involuntary and not related to lapsing.

We have carefully reviewed these arguments, but are not persuaded of their merit. It is well settled that 'evidence of ill will or a defendant's desire to harm the plaintiff's reputation, although probative of the defendant's state of mind, without more, does not establish 'actual malice". ***Blackwell v. Eskin, supra*** 2007 Pa. Super at ¶10, *quoting* ***Lewis v. Philadelphia Newspapers, Inc.*** 833 A.2d 553 (2004). Further,

[8] N.T. October 10, 2005, pp. 154-156.

even accepting appellant's position that Appellee understood the word "de-licensed to mean an involuntary loss of license, the trial court properly determined that "delicensed" which the parties stipulated is a made-up word,[9] was adopted by appellant from the website of another author, that he had his own understanding of the word, and that he had no reason to believe this information was false. Although appellant argues that Appellee, a licensed health care professional, should have checked with the licensing boards before republishing the statement "delicensed" this argument fails since, as this Court pointed out in ***Blackwell., supra*** "[e]ven were Appellee to be deemed negligent for failure to investigate, either by obtaining independent

[9] **See** N.T. October 11, 2005, pp. 103-104.

confirmation of his information or consulting other possibly more reliable sources, that finding would be insufficient to demonstrate actual malice." ***Blackwell v. Eskin, supra,*** 2007 PA Super 20 at ¶9 (citation omitted).

Appellant also argues that the trial court erred "in isolating appellees' alleged defamatory comments instead of construing them as a whole.[10] Specifically, appellant argues that the implied meaning of Koren's statement that "14 months ago I was told about the above lawsuit.[;] Barrett is now in trouble[/]" is that Koren "knew the details of the sit, was privy to its planning and believed that the suit was justified." [11] Appellant claims that the cross examination testimony

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[10] Brief of Appellant, p. 17.
[11] ***Id.*** p. 18.

of Koren, demonstrates that he did not know of the lawsuit 14 months before it was filed.[12] According to appellant, Appellee "falsely suggested that he was familiar with the facts" of the lawsuit.[13]

In determining whether there is clear and convincing evidence of actual malice, the statements must be read in context. ***Reiter v. Manna,*** 647 A.2d 562, 566 (Pa. Super. 1994), *citing* ***Baker v. Lafayette College,*** 516 Pa. 291, 532 A.2d 399 (1987). Here, the record reflects that the trial judge did properly consider the statements in context in making his ruling. The learned Judge J. Brian Johnson, in his on-the-record ruling on appellees' motion for directed verdict, stated:

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[12] ***Id*** pp. 18-19.
[13] ***Id*** p. 19.

With regard to "quackpot," this is something that is not capable of being true or false. It is name-calling. And under the caselaw, name-calling, no matter how offensive[14] is not actionable. So we move to the next one.

"De-licensed." The defendant heard this--or read this, I should say, from another author, Tim Bolen, and copied Bolen's writing to his website and e-mail and repeated the term.

There is no evidence that he entertained serious doubts as to the truth or falsity of this term. He had his own understanding, he accepted the term from Bolen, he had heard it before, he accepted his understanding without question. So there is no evidence that he entertained serious doubts as to the truth of the term.

With regard to the "racketeering suit for 10 million dollars", there was no proof provided by the plaintiff that a racketeering suit for 10 million dollars was not filed. There's no requirement by the defendant that he investigate. There is o evidence that he entertained serious doubts as to the truth of this statement before he published it.

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[14] The appellant is certainly an aggrieved party. Moreover, the ill will of Appellee is apparent as is his desire to harm the reputation of appellant. Nevertheless, as we have hereinabove noted, this Court has clearly established that such conduct, however repugnant, without more, does not equate to "actual malice."

> Finally, the phrase, "in trouble" ***in reference to the 10 million-dollar lawsuit,*** is an opinion. Only statements of fact, not expressions of opinion, can support a defamation action. There is a distinction here with opinions, depending upon whether they are based on facts, if the facts are expressed.
>
> Let me go back to that.
>
> A simple expression of opinion based on disclosed or assumed non-defamatory facts is not sufficient for an action of defamation, no matter how [un]justified and unreasonable the opinion may be or how derogatory it is.
>
> The opinion "in trouble" ***flows from the statement about the racketeering suit.*** That is a disclosed fact, and we have determined it to be a non-defamatory fact. So this is important because of the context of the opinion. And we need to deal with that, which we have now done.
> N.T. October 13, 2005, pp. 17-18 (emphasis supplied)

We discern no basis upon which to disagree with this quite precise, clear and cogent analysis, and find, contrary to the argument of appellant, that the trial

court properly considered the statements in context in determining whether appellant had established a defamation action against Appellees. We simply add that Koren's non-defamatory embellishment, namely, that he was told "14 months ago, about the lawsuit, along with his opinion that appellant was "in trouble", cannot subject Appellees to liability.

Nor do we find merit in the argument of appellant that he established actual malice because Appellees kept the information on the website after appellant requested a retraction. Specifically, appellant argues that after he informed Appellee that he was not "de-licensed" Appellee was "acting with actual malice when he kept false information on his website."[15] As the trial judge correctly noted, the United States

[15] Brief of Appellant. p. 21

Supreme Court, in ***New York Times Company v. Sullivan,*** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), held that a defendant's failure to retract a defamatory statement complained of is not adequate evidence of actual malice for constitutional purposes. The trial court further explained:

> [W]hen you talk about what he [Appellee] believed, just because Dr. Barrett asked for the retraction, that didn't necessarily mean that Dr. Koren agreed with him.
> And again we go back to the measure that it is not what a reasonable person would do, it is what Koren actually believed and he still believed those things were true.
> N.T. October 13, 2005, pp. 23-24.

As we agree with the trial judge, we find that appellant failed to show actual malice based on appellees' refusal to issue a retraction.

Lastly, appellant complains that the "the granting

of a directed verdict in favor of Appellees violates the sanction order of the court.[16] Appellant claims that the trial court erred by not enforcing its own discovery sanction order, and by refusing to permit appellant to read into evidence statements that had been ruled admitted as a result of appellees' failure to comply with discovery rules.

During discovery, in July, 2003, appellant filed a Third Request for Admissions which sought admissions from Appellee, including the following:

1. I know of no evidence that the racketeering suit filed in 2001 against appellant was justified.

2. I know of no evidence that appellant is or was delicensed.

3. I know of no evidence that appellant was ever disciplined by the Pennsylvania Board of Medicine.

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[16] *Id.*

Appellee did not respond or object to this discovery request, and ten months later, on April 24, 2004, the trial court entered the following order:

> IT IS ORDERED that the matters regarding which the questions were asked shall be taken to be established for the purposes of the action in accordance with the claims of plaintiff...
> IT IS FURTHER ORDERED that defendants are prohibited from opposing the claims of appellant at trial...

Subsequently, at trial the trial court sustained appellees' belated objections to appellant's Third Request For Admissions, finding that the admissions improperly asked for conclusions of law based on the use of the word "evidence" and therefore they were not admissions by definition. The trial court precluded appellant from reading the Third Request For Admissions into evidence and, at the close of appellees' case, granted appellees' motion for a directed verdict.

Appellant argues that the trial court violated its order of April 27, 2004, order, which had imposed sanctions on Appellees for failure to respond to discovery. Specifically, appellant contends that "the trial court failed to follow its own order prohibiting Appellees from opposing claims in unanswered discovery requests.[17] In support of his position, appellant relies on the "law of the case" doctrine. This Court, however, rejected a similar argument in ***Gateway Towers Condominium Association v. Krohn,*** 845 A.2d 855 (Pa. Super. 2004):

> The doctrine of law of the case provides that if an appellate court has considered and decided a question on appeal, neither that court nor any trial court may revisit that question during another phase of the same case. ***See PPG Indus., Inc. v. Commonwealth Bd. of Fin.,*** 567 Pa. 580, 790 A.2d 261 267 n. 11 (2001); ***Peden v. Gambone Bros. Dev. Corp.,*** 798

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[17] ***Id*** at 24.

> A.2d 305, 310 (Pa. Cmwlth. 2002). "The doctrine is designed to promote judicial economy, uniformity of decision making, protect the settled expectations of the parties, maintain the consistency of the litigation and end the case." ***Peden,*** 798 A.2d at 310. Significantly, however, the doctrine applies only to the actions of an *appellate court,* ***see Tarantino v. Kutztown Univ.,*** 654 A.2d 115, 117 (Pa. Cmwlth. 1995), and cannot be applied to prevent a trial judge from reconsidering his or her prior ruling, ***see Farber v. Engle,*** 106 Pa. Cmmw. 173, 525 A.2d 864, 866 (Pa. Cmwlth. 1987). Although the related "coordinate jurisdiction" rule may prevent one trial judge from revising the rulings of another trial judge on the same question, that rule applies only where a second judge purports to review the order of a different judge. ***See Leoni v. Whitpain Twp.,*** 708 A.2d 999, 1001 (Pa. Cmwlth 1998). ***It does not prevent a judge from re-examining and correcting his or her own rulings. See id.***

Id. 845 A.2d at 861 (emphasis supplied). As the "law of the case" doctrine is not controlling, and appellant has not stated any other basis for this Court to conclude that the trial court erred, we find that this argument

presents no basis upon which to grant relief.

Having reviewed the contentions of appellant, and finding that they present no grounds upon which to overturn the decision of the trial judge, we affirm the judgment entered upon the directed verdict in favor of Appellee.

Judgment affirmed.

BOWES, J. FILES A CONCURRING AND DISSENTING MEMORANDUM.

Judgment Entered.

_____

Prothonotary

STEPHEN BARRETT, M.D.	:NO. 502 MAL 2007
Appellant	:
v.	:IN THE SUPERIOR COURT
TEDD KOREN and	:OF PENNSYLVANIA
KOREN PUBLICATIONS	:
INC.	:NO. 1035 EDA 2006
Appellees	:

Appeal from the Judgment entered April 7, 2006, in the Court of Common Pleas, Lehigh County, Civil No. 2002-C-1837

BEFORE: FORD ELLIOTT, P.J. BOWES, J., and McEWEN P.J.E.

MEMORANDUM: **FILED JUNE 11, 2007**

I concur with the majority's decision in this case with one exception. I believe Appellees' publication of the information that Appellant was "de-licensed" was capable of defamatory meaning. I further believe that it was published with actual malice once Appellees were informed that Appellant had not been de-licensed and yet failed to remove that assertion from their website or otherwise indicate on the website that it was incorrect. Hence, the question of whether Appellant was defamed with respect to the continued publication that he had been de-licensed should have been submitted to the jury.

Our Supreme Court delineated whether a publication can have defamatory meaning as follows:

> To determine whether a statement is capable of a defamatory meaning, we consider whether the statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him." ***Birl v. Philadelphia Elec. Co.,*** 402 Pa. 297167 A.2d 472, 475 (1960) (quoting RESTATEMENT (FIRST) OF TORTS, §559 (1989). "Libel is the malicious publication of printed or written matter which tends to blacken a person's reputation and expose him to public hatred, contempt or ridicule." ***Schnabel v. Meredith,*** 378 Pa. 609, 107 A.2d 860, 862 (1954); ***see also Corabi v. Curtis Publishing Co.*** 441 Pa. 432, 273 A.2d 899, 904 (1971) (same). "The court must view the statements in context." ***Baker v. Lafayette College*** 516 Pa. 291, 532 A.2d 399, 402 (1987).
>
> Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. Thus, we must consider the full context of the article to determine the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the

average persons among whom it is intended to circulate.

Thomas Merton, 442 A.2d at 216. "It is not enough that the victim of the statements be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society." ***Scott-Taylor, Inc. v. Stokes,*** 425 Pa. 426, 229 A.2d 733, 734 (1967)

Tucker v. Philadelphia Daily News, 577 Pa. 598, 615, 848 A.2d 113, 124 (2004).

In the present case, the entire article about Appellant was derogatory. It referred to him as a quack pot, and indicated that he was the defendant in a potentially meritorious multi-million lawsuit and was "now in trouble". While the first assertion was an opinion and the latter was true when published, even though the lawsuit was subsequently withdrawn, the article continued by stating that Appellant was de-licensed. Viewed contextually in this critical article, "de-licensed" unequivocally conveyed that Appellant's license to practice medicine had been revoked by the pertinent medical authority. This statement was false since Appellant had voluntarily let his license lapse, which, as Ted Koren admitted at his deposition, is not being "de-licensed." That term devalued Appellant's professional status, diminished his community

standing, and would discourage association with him by people in the field; it was defamatory. ***Id.*** (newspaper article was defamatory because it incorrectly implied that community activists were overly interested in money and sex, which would lessen their reputation in the community and likelihood that members of community would want to associate with them); ***MacElree v. Philadelphia Newspapers, Inc.*** 544 Pa. 117, 674 A.2d 1050, 1054 (1996) (publication that implied plaintiff in defamation suit was abusing his elected office and was racist was defamatory because it accused plaintiff of professional misconduct).

Furthermore, Appellees were informed that Appellant had not been delicensed but then failed to remove this information from their website or otherwise indicate therein that the information was incorrect. In my view, the continued appearance of the information on the website was not the equivalent of failing to print a retraction. A newspaper is printed once and then archived. On the other hand, when information is placed on a website and not removed, it remains readily available and reviewed, and hence, continues to be

published. By retaining that information on their website without indicating that the fact was incorrect, Appellees published the information with actual knowledge that it was false. The internet can be a dangerous tool, and when someone is informed that information detrimental to a person's professional standing is factually wrong, the person who chooses to maintain that information on their website should not be permitted to do so with impunity. When this comment is viewed in a light most favorable to Appellant as we must, I find that a jury could reasonably have concluded that the defendant was liable. Hence, in my view, this defamation action should not have been removed from consideration by the jury. I therefore respectfully dissent.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA - CIVIL DIVISION

STEPHEN BARRETT M.D.:	
Plaintiff	**:CIVIL ACTION**
vs.	**:NO. 12002-C -1837**
TEDD KOREN D.C. and	**:**
KOREN PUBLICATIONS	**:**
INC. Defendants	**:**

NOTICE OF FILING JUDGMENT

NOTICE is hereby given that a Final Judgment in the above captioned matter has been entered on April 7, 2006.

A copy of all documents filed with the Clerk of Court in support of the within judgment are enclosed.

Andrea E. Naugle, Clerk of Court

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA - CIVIL DIVISION

STEPHEN BARRETT M.D.:	
Plaintiff	**:CIVIL ACTION**
vs.	**:NO. 12002-C -1837**
TEDD KOREN D.C. and	**:**
KOREN PUBLICATIONS	**:**
INC. Defendants	**:**

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925(a) STATEMENT

AND NOW, this 16th day of May, 2006, the undersigned enters the following statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(a):

A. **INTRODUCTION**

On October 13, 2005, at the close of the evidence in a jury trial and upon consideration of the Defendants' Motion For Directed Verdict, this Court entered an Order, for the reasons set forth on the record, granting said motion. At the same time, upon consideration of the Plaintiff's Motion For Directed

Verdict, this Court entered an Order for the reasons set forth on the record, denying said motion. The Plaintiff immediately made an oral motion for reconsideration which this Court denied on October 13, 2005.

On October 21, 2005, the Plaintiff filed a motion for post-trial relief. After delays due to transcription of the record, a continuance request by the Defendant due to vacation and two (2) requests by the Plaintiff for extension of time to file a brief in support of his motion for post-trial relief, argument was ultimately held on March 29, 2006. By Order dated march 31, 2006, this court denied the Plaintiff's post-trial motions. On April 7, 2006, the Plaintiff filed a Praecipe For Judgment for entry of judgment in favor of the defendants and against the Plaintiff in zero amount. On April 12, 2006, the Plaintiff filed an appeal from the

judgment entered in this matter on April 7, 2006 with the Superior Court of Pennsylvania at Docket number 1035 EDA 2006. On April 18, 2006, this Court entered an Order directing the Plaintiff to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.C.P. 1925(b). On April 26, 2006, the Plaintiff filed a "Statement Of Issues". Each of these issues will now be addressed individually.

B. **DISCUSSION OF THE PLAINTIFF'S STATEMENT OF ISSUES.**

1. **Whether or not the Trial Court erred as a matter of law in directing a verdict for Defendants against the Plaintiff?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005, pages 8 to 25.

2. **Whether or not the evidence viewed most favorably to the Plaintiff that: 1) the communication was defamatory; 2) the defendants published the communication; 3) the communication applied to Plaintiff; 4) the**

communication injured the Plaintiff; 5) Defendants published the communication with actual malice; and 6) the actual malice was established because, after notice of the falsity of the Internet communication, the Defendants continually posted it on the web site?

The Court fully addressed this issue on the record as reflected I the Notes of Testimony of October 13, 2005, pages 8 to 25.

3.. **Whether or not the Trial Court erred by dissecting the multiple defamatory words, instead of construing the communication as a whole as required by Rutt v. Bethlehem's Globe Publishing Company 335 Pa. Sup. 163,484 A.2d 72 (1984)?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005, pages 8 to 19 (in particular pages 15 to 19).

the Plaintiff asserts that all of the alleged defamatory statements, "quack pt", "de-licensed", "racketeering suit for a million dollars" and "in trouble"

must be read together, based on the holding in Rutt v. Bethlehem's Globe Publishing Company 335 Pa. Super. 163, 484 A.2d 72 (1984). However, Rutt states that alleged defamatory words in an article must be read in the context of that article.

In Rutt, the challenged article was an extended obituary of the appellant's son, who died as a result of a self-inflicted gunshot wound and the language at issue was "[c]ity police said [the victim] apparently shot himself to death with a rifle belonging to his father at the home of [friends], a couple of days after the victim's father asked him to leave his home..." The Rutt Court decided that for the purposes of determining whether the newspaper article was defamatory, the article must be construed as a whole, and each word

must be read in the context of the other words.

The context in which each statement was made was considered by the Court in its analysis of whether any of these statements were capable of defamatory meaning. Unlike the situation in Rutt, where the Court decided that the above quoted language, when read in the context of the entire article, was defamatory because it gave the article in inference that the victim shot himself because of his father, the statements at issue in the instant case do not depend on each other for their individual meanings and inferences. The Plaintiff offers no authority for the argument that all of the alleged defamatory statements must be read together. These were separate statements, each appearing in separate articles and therefore having their own context. Only "racketeering suit for a million

dollars" and "in trouble" were used in the same article and relate to each other, namely, the "in trouble" statement appears to relate back to the "racketeering suit for a million dollars statement and appears to be saying that Barrett is in trouble because he was sued in a racketeering suit for a million dollars. The Court considered this context when it made its ruling.

Even when read together, the statements at issue in this case are incapable of a defamatory meaning. Nothing about the statements changes when they are read together versus being read separately. Whether read separately or together, the statements "quackpot", "delicensed" and racketeering suit for a million dollars" and "in trouble" are incapable of defamatory meaning for the reasons stated on the record as cited above.

4. **Whether or not the evidence viewed most favorably to the Plaintiff established that Defendants knew that the defamatory statements were false, or with reckless disregard of their truth or falsity, particularly where the Defendant, Koren was a licensed health care practitioner, and he was using a made-up word--delicensed--to describe Dr. Barrett?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

5. **Whether or not the testimony of defendant, Dr. Koren, that he had "ill will" towards the Plaintiff plus keeping the defamatory information on the web-site is evidence of "actual malice"?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

6. **Whether or not the defense by a licensed health care professional that he was using a made-up perjorative word about the Plaintiff-delicensed- merely because someone else used it eliminates "actual malice"?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

6. **Whether or not the fact that Plaintiff's counsel received an admission from Defendant that his communication was false-knew about the lawsuit 14 months before it happened-is evidence of actual malice? [Plaintiff's "Statement Of Issues" contains two different issues identified as number 6)**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 8 to 25.

7. **Whether or not the Court erred as a matter of law in not allowing the unanswered "third request for admissions" into evidence which facts clearly established "actual malice"?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 13, 2005 pages 33 to 37.

The Court did not allow the Plaintiff's Third Request For Admissions into evidence because the Court granted the Defendants' objections to said admissions as they were conclusions of law, and therefore they were not the proper subject of

admissions.

The Court found that use of the word "evidence" in the Plaintiff's Third Request For Admissions was improper, as it required the Defendants to make a legal determination of what is evidence; a decision which must be made by a judge. The Court found that the Plaintiff should have used language such as "facts, documents, records and those such things".

As to the issue of the timeliness of the Defendants' objections, the Court found that while the objections were not made within thirty (30) days, if the requests are improper and if they are not provided for under the Rules and the caselaw, then they are not really requests for admissions in the first place. Therefore, the procedural rules guiding admissions are

inapplicable and the Court could, and in fact was required to, address the defendants' objections when they were voiced at trial.

8. **Whether or not the Trial Court eviscerated its own order of April 27, 2004 ordering that "...Defendants are prohibited from opposing the claim of Plaintiff at trial..." by allowing the Defendants to defend, despite not providing timely discovery responses?**

The Court fully addressed this issue on the record as reflected in the Notes of Testimony of October 10, 2005, pages 50 to 68.

The Court's decision to allow the Defendants to present a defense at trial is moot. The Court did not base its decision to grant the Defendants' Motion for Directed Verdict on the defense presented. The Court based its decision on the fact that the alleged defamatory statements were incapable of a defamatory meaning and that, therefore, the Plaintiff was unable to

present a prima facie case of defamation. Therefore, the evidence and testimony presented by the Defendants had no bearing on the Court's decision to grant the Motion For Directed Verdict, and this issue is moot.

Even if the issue were not moot, it is the Court's strong position that it did, in fact, interpret and enforce its own April 27, 2004 Order properly. Relevant portions of the Order state that "the matters regarding which the questions were asked shall be taken to be established for the purposes of the action in accordance with the claims of the Plaintiff..." and that the "Defendants are prohibited from opposing the claims of Plaintiff at trial and from introducing in evidence designated documents, things or testimony." The Court did not intend this Order to preclude the Defendant

from opposing any claims by the Plaintiff, but only those directly related to the unanswered discovery requests propounded on the Defendants by the Plaintiff. When reading the above language as a whole, it is the Court's position that the Order reflects that intention. Therefore, the Court did, in fact, properly interpret and enforce its own Order.

The Plaintiff raised this issue in his Motion For Post-Trial Relief, which motion the Court denied. In that motion, the Plaintiff made four arguments based on his interpretation of the April 27, 2004 Order: (1) that the Plaintiff was entitled--at a minimum--to a binding instruction at the close of the case, as requested by the Plaintiff, that the Defendants could not oppose the status of the Plaintiff's testimony concerning

Plaintiff's claim that the California racketeering lawsuit was groundless; (2) that by failing to enforce its own Order, the Plaintiff was denied the opportunity to present his case before the jury; (3) that if the trial court enforced the Order, the trial court would have permitted the Plaintiff to read into evidence the Plaintiff's Request For Admission No. 3; and (4) that if the trial court enforced the Order, the Defendant's Motion For Directed Verdict would have been properly denied. The Court will address each of these arguments.

Even if argument (1) were true, that the Plaintiff was entitled to a binding instruction at the close of the case regarding the Plaintiff's license and the racketeering lawsuit, it would be harmless error. Such a binding instruction to the jury regarding the Plaintiff's

testimony about his license and as to the Plaintiff's claim that the California racketeering lawsuit was groundless would not necessarily have been enough for a jury to conclude that the defendants were liable for defamation.

In the Plaintiff's second argument that, were the Court to enforce the Order as the Plaintiff interpreted it, rather than as the Court intended and applied it, the Plaintiff would have had the opportunity to present his case to the jury. The Plaintiff did, in fact, present his case to the jury. After that opportunity, the Court granted the Directed Verdict.

The Plaintiff's third argument that, "if the trial court enforced the Order, the trial court would have permitted the Plaintiff to read into evidence the Plaintiff's Request For Admission No. 3" is misplaced

entirely. The Court reiterates that it did enforce its Order, just not as the Plaintiff would have preferred it to be enforced. The Court's decision to preclude the Plaintiff from reading the Plaintiff's Request For Admission No. 3 into evidence was not based in any way on its Order. It was based on the fact that the Court granted the Defendants' objections to the admissions because they improperly asked for legal conclusions.

The Plaintiff's fourth and final argument that if the Court had enforced the Order, the Motion For Directed Verdict would have been denied, is erroneous as well. Admittedly, if the Court had enforced the Order as the Plaintiff is interpreting it, that the Defendants could not oppose any or the Plaintiff's claims and that the Plaintiff's Request For Admissions No. 3 should have

been read into evidence, then the Plaintiff might be right. However, the Court did enforce its Order, in the context of how it was written and as the Court intended it to be enforced. The Order did not preclude the Defendants from opposing every claim of the Plaintiff, but only those specifically addressed by the Plaintiff in his discovery requests and left unanswered by the Defendants. Regarding the Plaintiff's Request For Admission No. 3, the Court precluded the admissions from being read into evidence because the admissions improperly asked for legal conclusions and therefore they were not admissions by definition.

BY THE COURT:

J. Brian Johnson, J.